

UNREDACTED TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

UNITED STATES OF AMERICA .
VERSUS . NO. 1:08-CR-10102-JDB-1
MICHAEL R. LEMONS . JACKSON, TENNESSEE
1:20 P.M.
.

APPEAL TRANSCRIPT
SENTENCING HEARING PROCEEDINGS
MAY 13, 2010

BEFORE THE HONORABLE J. DANIEL BREEN,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

FOR THE UNITED STATES: MR. JERRY R. KITCHEN
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1 (Defendant present)

2 **THE COURT:** All right, we're set this afternoon
3 in the matter of U. S. versus Michael Lemons, 08-10102.

4 Is the government ready to proceed this
5 afternoon?

6 **MR. POWELL:** Yes, Your Honor.

7 **THE COURT:** Is the defendant ready to proceed?

8 **MS. SMOTHERS:** Yes, sir.

9 **THE COURT:** All right, counsel, I've received
10 and reviewed your -- well, the presentence report as well
11 as your position papers.

12 Mr. Powell, did you have any -- I don't think
13 there were any objections by the government, was there,
14 sir?

15 **MR. POWELL:** No, Your Honor.

16 **THE COURT:** Did you have anything you needed to
17 take up?

18 **MR. POWELL:** We have four exhibits. They are
19 numbered sequentially 1 through 4, and they are,
20 respectively, the waiver in indictment number 9311 from
21 Maury County, judgments in those -- count 1 and count 2 in
22 that same case, and then a reporter's transcript of the
23 entry of the plea of guilty dated February 2, 1996.
24 Ms. Smothers and I each have copies, and I have prepared
25 these copies and we are submitting them to the court with

1 no objections.

2 **THE COURT:** No objections?

3 **MS. SMOTHERS:** No, sir, Your Honor.

4 **THE COURT:** All right, Ms. Smothers, let me go
5 ahead and take up your objections that you've lodged in
6 this matter. I believe you had --

7 **MS. SMOTHERS:** Yes, sir, Your Honor.

8 **THE COURT:** Paragraph 15?

9 **MS. SMOTHERS:** Yes, sir. And we still maintain
10 our objections as we have basically set them out, Your
11 Honor. I don't know that I can add a tremendous amount by
12 way of argument to Your Honor today. I think we've
13 basically set out the basis for our argument.

14 We had initially -- I think Mr. Powell and I
15 both initially, after extensive contact with the Maury
16 County court system, with the clerk and the office of the
17 clerk, had not had documentation, as you can see from my
18 objections themselves. They're simply -- We simply had a
19 copy of the judgment, and that was all that we had at that
20 point, which indicated *pro se*, that there was nothing
21 behind it that had been provided, and we have requested
22 repeatedly for that documentation, and it simply wasn't
23 provided.

24 The documentation we did receive which did
25 exist is what Your Honor now has as exhibits 1, 2 and 3.

1 I, nevertheless, maintain our objections. Obviously, he
2 did sign a waiver of counsel. There's a little X mark
3 there on the box and he's signed that document as far as
4 the waiver of a jury trial and, I think, proceeding by
5 information in that case.

6 I would like to call Mr. Lemons just very
7 briefly about the circumstances of this event and that plea
8 for the record if we could do that, and I think that's
9 basically the proof we would want to present. I'd like to
10 be heard as far as disposition with some other matters, but
11 if I could call him briefly.

12 **THE COURT:** All right, come around.

13 **MICHAEL LEMONS, THE DEFENDANT, WAS DULY SWORN**

14 **DIRECT EXAMINATION**

15 **BY MS. SMOTHERS:**

16 Q Let me ask you, you're Mike Lemons; correct?

17 A Yes, ma'am.

18 Q Michael Lemons.

19 Let me ask you to go back, if you would, and I know
20 this is quite a ways back, but back in 1996 in Maury
21 County, did you appear in court about some burglary
22 petitions?

23 A Yes, ma'am.

24 Q How did you get there? I mean physically.

25 A I was on probation out of Jackson. I was working at

1 a place called Club Alibi outside of Jackson, Tennessee.
2 And at night, whenever I got off work, I was walking to a
3 girl's house that I was dating. She lived in an apartment
4 complex. There had just been a fight up there at the
5 apartment complex, and police officers were leaving there,
6 and they saw me walking on the street, on the side of the
7 road, and it was probably about two o'clock in the morning,
8 and picked me up. When they did, I didn't have any ID on
9 me, so they asked me my name, and I told them my name was
10 Michael Lemons, and they ended up running an NCIC and had a
11 hit for a fugitive from justice out of Maury County,
12 Tennessee.

13 Q And when you said you were on probation here, is that
14 the burglary case that was in Madison County back in '94?

15 A Yes, ma'am.

16 Q Okay. So were you taken to jail here, then to Maury
17 County, or what?

18 A I was taken to jail in, I think, Lexington. I think
19 that's where -- I don't remember exactly which town it was.
20 I think it was Lexington. I was taken there. I sat there
21 for about two or three days before Maury County came and
22 got me.

23 Q So did you then go to the Maury County jail?

24 A Yes.

25 Q Do you recall how long you were there before you ever

1 were in court about that case?

2 A I went to court one time and was there for roughly
3 about a month, maybe a few weeks to a month.

4 Q Before you went to court, you mean?

5 A Yes, ma'am.

6 Q Okay. So your recollection is you actually appeared
7 in court one time.

8 A Yes, ma'am.

9 Q And the whole thing was done in one day, one event.

10 A Yes, ma'am.

11 **MS. SMOTHERS:** Your Honor, might I show him the
12 exhibits?

13 **THE COURT:** You want the transcript too?

14 **MS. SMOTHERS:** Yes, sir, Your Honor, just --

15 **BY MS. SMOTHERS:**

16 Q I'm showing you exhibits 1, 2, 3 and 4.

17 **THE COURT:** You can put them on the screen. I
18 assume they've already been marked.

19 **MS. SMOTHERS:** Yes, sir, Your Honor.

20 **THE COURT:** That way everybody can see them.

21 **MS. SMOTHERS:** Okay. If I can get them to fit.

22 **BY MS. SMOTHERS:**

23 Q This has been marked as exhibit 1, "Waiver of Trial
24 by Jury and Petition to Enter Plea of Guilty." Do you
25 recall who filled in or do you know who filled in this top

1 information?

2 A No, ma'am.

3 Q Okay. You don't recall that you did it.

4 A No, ma'am.

5 Q Okay. This is a two-sided document. I'm showing you
6 the backside of that document.

7 **THE COURT:** You might want to pull it up a
8 little bit.

9 **MS. SMOTHERS:** Yes, sir. It's a little
10 difficult to read.

11 **BY MS. SMOTHERS:**

12 Q Again, there's some language at the top. It sets out
13 the recommendation for the punishment. But looking at
14 this, 6 February of '96 and this signature, whose signature
15 is that?

16 A The signature is definitely mine.

17 Q Okay. Do you know if you filled out any of the other
18 items other than the signature?

19 A By looking at the February and the 6th, no, they
20 shouldn't be mine.

21 **THE COURT:** Should or should not?

22 **THE WITNESS:** Should not.

23 **BY MS. SMOTHERS:**

24 Q And let me just ask you, and these documents
25 reference it but your signatures are not on any other

1 items. What sentence do you recall getting? What was the
2 punishment?

3 A What they gave me was five years -- as I understand,
4 they gave me five years on top of the Jackson probation to
5 run together, which gave me a total of thirteen years
6 intense probation. I had eight out of Jackson already.
7 The reasoning was that that charge happened before, the one
8 in Jackson.

9 Q And where were you to actually be supervised?

10 A In Jackson, Tennessee.

11 Q Where were you living at that time?

12 A In Jackson.

13 Q So you weren't in Maury County at the time.

14 A No.

15 Q When you went to court -- You said you went to court
16 that first time. Let me ask you first, how old were you
17 when you did this plea?

18 A I'd say 19 years old.

19 Q Okay. At that time --

20 A Nineteen, twenty.

21 Q Okay. At that time, was there any problem that you
22 were having as far as personal with drug use, alcohol use,
23 that type of thing?

24 A No, ma'am.

25 Q Had you graduated high school?

1 A No, ma'am. I graduated from Knoxville Job Corps in
2 '89 in Knoxville.

3 Q Is that like a GED or is that some other --

4 A GED.

5 Q GED. All right. So you had that.

6 A Yes, ma'am.

7 Q You can read and write then. That's not an issue.

8 A Yes, ma'am.

9 Q Do you recall about, from your recollection, how long
10 you were in court? I mean an hour, all day, ten minutes,
11 what?

12 A It wasn't very long. I'd say maybe five, ten
13 minutes, just long enough for them to tell me what I got,
14 then they released me ROR, I guess.

15 Q You were to report to somebody back here in Madison
16 County --

17 A Yes.

18 Q -- or were you already being supervised here?

19 A I was already being supervised here in town, and they
20 were supposed to contact my probation officer in Jackson
21 and let him, I guess, add the five years to it, I guess, or
22 whatever.

23 Q You said you sat for about a month, or several weeks
24 at least, in the Maury County jail before you went to
25 court.

1 A Yes, ma'am.

2 Q Did you ever during that period of time speak to a
3 lawyer?

4 A The only other person I talked to was the
5 investigators. The investigators are the ones that came
6 and talked to me from the beginning.

7 Q When you say the investigators, you mean from the
8 sheriff or police?

9 A Yes, ma'am.

10 Q Law enforcement officers.

11 A Yes, ma'am.

12 Q Okay. Did you ever -- Before you were standing in
13 court, did you ever speak with the prosecuting attorney
14 about the charges or what the options were --

15 A No, ma'am.

16 Q -- before you were there? Okay.

17 And when you were in court -- Obviously, we see the
18 paperwork, and it says, I'm waiving my right to counsel.
19 Do you recall a public defender or any attorney of that
20 type being there in court?

21 A No, ma'am.

22 Q Was anyone else in court other than you in your case?

23 A Yeah, the courtroom was full of people, but I never
24 talked to anybody else. I didn't even remember signing the
25 paperwork, you know.

1 Q How did you get -- This may sound like a strange
2 question, but how did you get home? What happened after
3 you left the courtroom?

4 A Okay, whenever I left the courtroom, I -- I'm from
5 Jackson, Tennessee. I never even remember being in Maury
6 County. And I asked them, Well, how do I get back to
7 Jackson? And they told me to go to the nearest church,
8 that there was a church down the road in town, and I went
9 to the church, and the church was able to get me a bus
10 ticket. The pastor carried me to the bus station and got
11 me a bus ticket and waited for me to be able to get on the
12 bus to get back to Jackson.

13 Q Okay, so you came back home, back to Jackson.

14 A Yes.

15 Q And that's the last contact you had with Maury
16 County --

17 A Yes.

18 Q -- about any of that.

19 A Yes, ma'am.

20 Q All right. Do you recall the judge explaining to you
21 as you were going through this process that if you pled
22 guilty and got convicted, if you got in trouble later you
23 could get -- it could cause you more trouble, get you a
24 worse sentence or make you in a higher category or anything
25 like that?

1 A Through them, no. I was under the impression it was
2 all going straight to Jackson. Of course, if I did
3 anything in that county, you know, it would go through
4 Jackson and be violated there. But as to Maury County, I
5 had no other tie-in as far as I knew.

6 Q Why did you -- I mean you're 19 years old. Why did
7 you sign these papers?

8 A I don't know. I don't know. Maybe the deal sounded
9 too good. I don't know.

10 Q Did you know what would happen if you didn't sign
11 them? Did you have a thought as to where you would be if
12 you didn't sign them?

13 A No.

14 Q Okay.

15 **MS. SMOTHERS:** I think that's all I have, Your
16 Honor.

17 **THE COURT:** Mr. Powell?

18 **MR. POWELL:** No questions, Your Honor. Thank
19 you.

20 **THE COURT:** You can step down, sir.
21 Any additional proof you want to present?

22 **MS. SMOTHERS:** No, sir, Your Honor.

23 **THE COURT:** So is it my understanding that
24 basically the objection is to the extent that the
25 defendant -- it all revolves around this conviction that

1 occurred in Maury County?

2 **MS. SMOTHERS:** Yes, sir, Your Honor.

3 **THE COURT:** Mr. Powell, I'll hear from you.

4 **MR. POWELL:** Your Honor, I don't have anything
5 to add. There's nothing to indicate these aren't valid,
6 knowing, voluntary pleas that were entered by the
7 defendant, valid judgments that were entered in Maury
8 County, and the presentence report is accurate.

9 **THE COURT:** Okay.

10 Ms. Smothers?

11 **MS. SMOTHERS:** Well, Your Honor, as I've
12 indicated, our objections were filed before either side,
13 the government or the defense, had ultimately obtained
14 those Maury County documents that are entered as exhibits
15 now. And my initial objection was that we simply had a *pro*
16 *se* plea -- I'm sorry, a judgment that indicated *pro se*
17 without any other knowledge as to what happened.

18 But even in light of these documents which came
19 from the clerk, and Mr. Powell and I both received them and
20 we can't dispute those documents are the documents that
21 come from that prior court proceeding, then what you have
22 is a man who's 18 years old, apparently, as the event was
23 alleged to have occurred, 19 when he pled. We still
24 maintain our objection that to have a knowing and voluntary
25 waiver -- and there's no doubt there was a waiver. I mean

1 it's signed. It's got a check mark and he signed it.

2 **THE COURT:** And he acknowledged to the judge
3 that he was doing that.

4 **MS. SMOTHERS:** Yes, sir. Yes, sir, he did.

5 **THE COURT:** I probably would have asked him to
6 say yes or no, but apparently the court picked up his nod.

7 **MS. SMOTHERS:** It indicates he was nodding.

8 **THE COURT:** He nodded yes on everything that he
9 was asked by Judge Hamilton.

10 **MS. SMOTHERS:** Yes, sir.

11 And again, there's no -- what we don't see --
12 and again, it's -- As he testified, you know, there's
13 very -- The plea, actually, the colloquy, is even more
14 limited and bare bones, if you will. The documents
15 themselves actually have quite a bit more information than
16 the plea colloquy itself as far as background for the
17 waivers and those matters.

18 But I would still request Your Honor to
19 consider whether this admitted plea was a knowing and
20 voluntary waiver, not so much voluntary, but knowing,
21 again, with a man -- a young man who's 19 years old taken
22 to a county where he doesn't really have any contact,
23 apparently was there on a very minimal level, didn't even
24 know how to get back home or really where he was in
25 relation to Jackson, I think, once he stepped out of the

1 courthouse. That in that situation, in light of the
2 constitutional aspect of it being a knowing waiver, there's
3 no indication, and as he indicated, that he was under the
4 influence of drugs or alcohol or something like that that
5 would affect the voluntariness of it. But as far as the
6 knowing aspect, I think a barely 19-year-old defendant,
7 admittedly without counsel, who apparently, other than
8 being interrogated by the officers, literally never saw
9 anybody for several weeks and then was brought to court and
10 this was done. And I find that somewhat shocking.
11 Obviously, it's what happened, and the judgment went down.
12 It's long since expired. I mean, the five-year supervision
13 was over, you know, years and years ago.

14 But, nevertheless, it's our position that
15 there's still a constitutional question as to whether it is
16 a knowing waiver, largely in light of his shockingly young
17 age. He was an adult, absolutely, no doubt. He's a
18 teenager but, legally, he's an adult.

19 **THE COURT:** But is there anything -- I mean,
20 you know, you obviously pointed out he was 19 or 20,
21 whatever he was.

22 **MS. SMOTHERS:** Nineteen, yeah.

23 **THE COURT:** But what do I have in front of me
24 that indicates he didn't understand what he was doing?

25 **MS. SMOTHERS:** I think just the totality --

1 **THE COURT:** Besides his age.

2 **MS. SMOTHERS:** I think just the totality, Your
3 Honor. And again, we're not saying he was, you know,
4 kidnapped under cover of darkness and whisked away. I'm
5 not trying to imply that, but simply that he's taken
6 halfway across the state to another county. He apparently
7 sits in jail for several weeks, close to a month, and then
8 officers from either the county or the city, I'm not sure
9 who, questioned him, and he's brought into court at some
10 later date. It's obviously a docket or some type of a
11 routine report because the courtroom is full of people.
12 And then in a matter of minutes, okay, here's your plea.
13 You just go on home, head on home, get on a bus or
14 whatever. He signs it and is gone. And I think, again,
15 the -- I know the papers say he's literate. There's no
16 dispute he was literate. But again, given his -- given his
17 youth and the fact that he's away from home, had been away
18 from home for several weeks, apparently without contact,
19 basically, with anybody, just kind of waiting for someone
20 to take him on the next step to get him to court, I think
21 would go to whether the waiver was knowing.

22 And so we still maintain our objection as far
23 as that -- I say sentence, or the two matters that -- that
24 docket number 9311 counting as far as the armed career. I
25 don't -- We have no other documentation to present. I

1 think we set that out, basically, in our response, and Mr.
2 Powell has as well.

3 But I'd like to address the court, if I might,
4 regarding disposition. I didn't know if Your Honor wanted
5 to wait till -- as far as where to serve the sentence and
6 that type of thing.

7 **THE COURT:** We'll get to that in just a minute.

8 **MS. SMOTHERS:** Yes, sir.

9 **THE COURT:** Mr. Powell, is there anything else
10 you wanted to add?

11 **MR. POWELL:** No, Your Honor. Thank you.

12 **THE COURT:** Well, the convictions which counsel
13 argues should not be, I guess, considered because they
14 were -- there's no indication they were knowing and
15 voluntary or that, I think, Mr. Lemons was too young or he
16 had been away from home or something of that nature, this,
17 as the court reviews the presentence report, was not his
18 first foray into the criminal justice system. He had a
19 previous conviction in '95 for theft over \$1,000. He had
20 another conviction in '94 for driving offenses. And he had
21 another conviction for aggravated burglary and carrying a
22 deadly weapon in '95 in Madison County. So he had already
23 had at least three -- Let me make sure I'm not missing
24 something. He actually had something as a juvenile, but at
25 least three adult convictions before he ever got to Maury

1 County and pled guilty to the two aggravated burglaries.

2 Before me, I have a document, exhibit 1, a
3 waiver of trial by jury and a petition to enter a plea of
4 guilty, that has a check mark, even though Mr. Lemons says
5 he didn't put some of this other information on here, but
6 where it's check-marked it says, I waive my right to have
7 counsel appointed for me, and then his signature, which he
8 admits that's his signature on there.

9 If that were in and of itself, there might be
10 some question, but I also have a transcript of the
11 proceedings on that day with Judge Hamilton where he
12 started out by asking him, said, Do you want to -- You have
13 indicated by signing the criminal information that you want
14 to proceed by that as opposed to having the case submitted
15 to the Maury County grand jury. And he says: Do you
16 understand that you have that right and you can waive that
17 and proceed by what we call a criminal information, and is
18 that what you want to do? And Mr. Lemons acknowledges he
19 did.

20 Then he says: Do you want me to allow that?
21 And again, he acknowledges that.

22 And then he also says: You signed a document
23 that says you want to waive your right to trial by jury and
24 want to enter a plea of guilty. Is that correct? And the
25 defendant answers: Yes, sir.

1 And then he says: Do you understand what
2 you're charged with? And he says: Now, are you
3 represented by an attorney?

4 And I think Mr. Colbert, who I think was the
5 DA, I believe that's correct -- well, I'm not sure if
6 Mister -- Let's see. There was someone by the name of Mr.
7 Colbert who steps in and says: Judge, he wants to
8 represent himself.

9 And Judge Hamilton asked Mr. Lemons again: All
10 right, is that correct? And Mr. Lemons acknowledges that
11 he did.

12 (Reading) So, Mr. Lemons, you are representing
13 yourself today? And again, he acknowledge that he did.

14 And Judge Hamilton said: You understand if you
15 want a lawyer, I'll appoint you one, but do you want to do
16 it this way and represent yourself? And again, Mr. Lemons
17 acknowledged that he did.

18 Then he went on further to say that he had a
19 right to a trial by jury, would appoint an attorney to
20 represent him there, that he can assist him with witnesses,
21 and then he goes through the other rights. Then Judge
22 Hamilton asked him, he said: Is there anything you don't
23 understand about what I just said? And Mr. Lemons said no,
24 or shook his head no.

25 And then he proceeds to tell him what he's

1 being charged with. Then he said: Are you in fact guilty
2 of those charges? That's correct? And Mr. Lemons said
3 yes.

4 Then he asked him if he was promised or
5 threatened, had anybody done that, and he said no.

6 You know, with all of this information, not
7 only with the transcript and the -- in conjunction with the
8 Waiver of Trial by Jury and Petition to Enter Plea of
9 Guilty, it seems to me that Mr. Lemons made a knowing and
10 voluntary waiver of his right to counsel and that he freely
11 and voluntarily entered a plea of guilty to the charges in
12 1996, February 6, 1996, for two counts of aggravated
13 burglary, and the court will overrule the objection that
14 these were not appropriate or voluntary waivers, and I will
15 overrule Ms. Smothers' objection to that.

16 All right, what else?

17 **MS. SMOTHERS:** Just if I can address Your Honor
18 concerning --

19 **THE COURT:** Sure. You can go ahead and do that
20 now.

21 **MS. SMOTHERS:** Yes, sir. Thank you.

22 Your Honor, in light of Your Honor's ruling,
23 obviously we're faced with, I would offer, a Draconian
24 sentence, a drastic sentence. That's what the statute
25 provides, like it or not. But, still, if you look at this

1 situation, Mr. Lemons' situation, individually in light
2 of -- and I think it's set out in the presentence report.
3 All of these events, '94, the event which gave rise to the
4 Maury County plea, happened in like January of '94. Then
5 the -- it's paragraph 29 of the presentence report. That
6 event happened in December of '94. It was pled earlier,
7 but it happened later that same year. So the Maury County
8 was the last plea, although it was not the last event to
9 occur in time.

10 But I say all that to say, basically, '96 even
11 comes too far forward. You would say '94 is when those
12 events happened, the last of this conduct. And as the
13 report sets out, and we can't dispute it, he was to be
14 supervised here. He moved -- as the report indicates, he
15 moved out West and was apparently living there, working
16 there, did not get into trouble. The report doesn't show a
17 bunch of arrests or problems or any kind of -- those type
18 of issues for years and years.

19 He comes back to Tennessee. His mother lives
20 here. She's here today. And that's where his family --
21 where his mom is. He comes back here, and it's my
22 understanding -- And the officers -- one of the officers is
23 here today. But it's my understanding right before this
24 case came to be, there basically was a roundup, if you
25 will, of just old outstanding warrants that were sitting

1 around at the sheriff's department or the police department
2 in an effort to clean up files and address those hanging
3 matters. There was a warrant for either absconding or
4 probation violation where -- because he was gone. He
5 simply had not reported. It would have been, I suppose, a
6 technical violation. No new crime, if you will, but just
7 didn't report. And they track him down through utility
8 records. They go to his house. He's there, and here we
9 are today. The gun is found when they come to arrest him
10 on that old warrant. It had been out since the late '90s.
11 It just had never been served on him but was still a valid
12 warrant, and that's what brought us here today.

13 Unfortunately, because of the statutory
14 construct of 924(e), he's facing a shockingly severe
15 sentence compared to someone who had maybe even less
16 history or somewhat similar history but, you know, went out
17 and robbed a bank or something. I mean this sentence is
18 absolute. It binds the court. It's statutory.

19 And what I would ask Your Honor to consider as
20 far as service of the sentence, both where and the wording
21 of our order in relation to some of these other matters,
22 this man is not someone who's been out continuing to behave
23 in an unlawful way, other than being gone and not
24 reporting. And clearly, that's a violation of his
25 conditions of probation. We don't dispute that. But he

1 wasn't out robbing banks, selling drugs, doing any of the
2 other things that folks could do in the intervening decade
3 and more, twenty -- a long time.

4 I say all that to say that paragraph 29, that
5 that sentence on June 28, '08, he was revoked to serve that
6 sentence. It's my understanding that he had been paroled,
7 basically was paroled to the federal hold. But regardless,
8 as Your Honor sees in the language, the sentence won't
9 expire until June 3, 2014. I would ask Your Honor to
10 fashion this judgment, because of this long intervening
11 time -- and unfortunately, again, under armed career
12 criminal, they never age out. If these convictions were
13 forty years old, he would be facing the same sentence. If
14 he had led a 110 percent law-abiding life for forty years
15 post-plea, he'd be facing this same sentence. There's
16 nothing else in the statute or guidelines that causes that
17 kind of result other than this armed career. And I don't
18 think there's any other word other than Draconian to
19 describe that sentencing scheme. But that's where we are
20 right now.

21 I would ask Your Honor to state in this
22 judgment, to rule that this sentence, whatever it may be,
23 is to be concurrent with and he's to be given sentence
24 credit for any time that he has served on paragraph 29,
25 that Madison County Circuit number 95-155. Again, I think

1 Your Honor has discretion to fashion either a consecutive
2 or a concurrent sentence, to fashion this sentence in a
3 variety of ways. But given the unusually long time line
4 without any indication of other illegal activity other than
5 he just didn't report, he moved away, and when he came back
6 years later, apparently, there he is not bothering anybody,
7 going to work, and we end up here today.

8 He has served -- He's been in custody since he
9 was arrested. He has served, apparently, what the state
10 wants from him on that case; but, nevertheless, I'm
11 confident the Bureau of Prisons will not likely give him
12 credit for that time because it was credited on that case.

13 The same thing is true with paragraph 27, which
14 is those Madison County cases -- I'm sorry, which is that
15 Madison County case 94-1472. Again, he's revoked June 28th
16 to serve the balance of that sentence. It expired July --
17 It will expire July 9th of this year, 2010.

18 I'm asking Your Honor -- and it is somewhat
19 unusual, but I'm asking Your Honor to state in this
20 judgment that this sentence on the federal case is to be
21 concurrent -- well, maybe the better way to say that is
22 he's to be given sentence credit on the federal case for
23 any time he has served in custody on paragraph 29 or
24 paragraph 27, those Madison County cases, because, again,
25 this is -- I think it is an unusual case. This man hasn't

1 been a thorn in the law enforcement side for fifteen years,
2 just kept getting in trouble until they finally caught him
3 with a gun. He was doing nothing with the gun. It was a
4 long gun, basically apparently there, I guess, for home
5 protection, as any number of folks have. Unfortunately, he
6 can't have one. But we'd ask Your Honor to state that he's
7 to be given credit on this sentence for any days he has
8 served on those sentences.

9 I would also request -- And again, the length
10 of the sentence may preclude this initially, but I would
11 still request on his behalf that Your Honor recommend that
12 he be housed at a low-security camp. Again, I'm confident
13 the Bureau of Prisons administrative regs will prevent that
14 initially in this sentence, but at some point he will come
15 down to a term where he could be camp-eligible. It's my
16 understanding that now, with a ten-year or less sentence,
17 that you would be normally considered for camp
18 participation or placement. I would ask Your Honor to make
19 that recommendation, again, because of the unbelievable
20 length of time between these priors and where we are today,
21 where he was at the time that he was found with the gun,
22 which, hopefully, would assist him in being, I would offer,
23 in a housing situation and in a classification that would
24 more accurately reflect what he's been doing and who he is
25 as opposed to just the number of months on paper, which if

1 you look at that just in a vacuum in the case, he's a
2 really bad apple and there must be something awful going on
3 because he's got this big sentence. But again, he's just
4 someone whose priors are never going to age out. If he
5 gets out and comes back in court at age 65 with a gun
6 charge, he'd be looking at this same sentence. It makes no
7 difference. And I would offer to you that's patently
8 unfair, although that's what the statute says.

9 But I think to avoid some of that, we ask that
10 Your Honor give him credit for any days served on those
11 sentences and make a recommendation for the camp and also
12 for substance abuse treatment. I think there's
13 historically been an issue with that. He may be largely
14 past it now, but we do request it on his behalf because
15 there has been an element of that in his past history.

16 That's all our requests today.

17 **THE COURT:** Mr. Powell?

18 **MR. POWELL:** Well, Your Honor, just two
19 matters. I'll take them in reverse order of Ms. Smothers'
20 presentation.

21 I would submit to the court that because it is
22 an unusual case does not establish a lawful basis for a
23 lower sentence.

24 **THE COURT:** I think she's wanting credit. Not
25 necessarily concurrent, but credit, I guess.

1 **MR. POWELL:** Well --

2 **THE COURT:** Six one half dozen or the other.

3 **MR. POWELL:** Call it credit, concurrent
4 sentencing, it is exactly what the court has just said.
5 And part of the factual basis that belies that reasoning is
6 her same argument that these happened so long ago, the
7 cases from '94 and '96. It's hard to fathom how that makes
8 creditworthy in this case that it occurred when it did.

9 The other thing is Ms. Smothers' statement of
10 if he had lived a law-abiding life. And if he had lived a
11 law-abiding life, he wouldn't be here today. It's that
12 simple. The reason that we are here with Mr. Lemons is
13 because he didn't do what he was supposed to do. If he had
14 done what he was supposed to do, this case never would have
15 occurred.

16 **THE COURT:** All right, sir.

17 Anything else, Ms. Smothers?

18 **MS. SMOTHERS:** No, sir, Your Honor.

19 **THE COURT:** Mr. Lemons, the court will permit
20 you to say anything on your own behalf if you wish to do so
21 at this time, sir.

22 I need something for the record. Just tell me
23 you don't want to say anything.

24 **THE DEFENDANT:** No, sir.

25 **THE COURT:** You don't? Okay.

1 All right, in this matter Mr. Lemons had
2 previously pled guilty to count 1 of the indictment
3 charging him with being a convicted felon in possession of
4 a firearm in violation of 18, United States Code, Section
5 922(g).

6 The court is utilizing the guidelines as
7 advisory, and in doing so I'm referring to the 2008 edition
8 of the guideline manual, which under that condition, under
9 Section 2K2.1(a)(4)(A), Mr. Lemons would be at an offense
10 level of 20. However, based upon Section 4B1.4(b)(3)(B),
11 Mr. Lemons qualified as an armed career criminal because he
12 has had three or more violent felony -- excuse me, violent
13 felony offenses, which under 18, United States Code,
14 Section 924(e)(2)(A), would be subject to an enhanced
15 sentence, and that would place his -- actually, that's a
16 mandatory minimum enhanced sentence, and that would place
17 his offense level at 33.

18 And I'm assuming the government moves for
19 the -- You may have already moved for the additional point
20 under acceptance. Did you, Mr. Powell?

21 **MR. POWELL:** Yes, Your Honor. I filed a
22 motion.

23 **THE COURT:** All right, the court will grant
24 your motion and give Mr. Lemons a full three-level
25 reduction for acceptance. That reduces his offense level

1 to a 30.

2 Under his criminal history category, he has
3 three criminal history points based upon the '95 aggravated
4 burglary and carrying a deadly weapon. He also has two
5 additional points based upon the fact that at the time of
6 the instant offense he was on probation under Section
7 4A1.1(d). That gives him five criminal history points.
8 That would have otherwise placed him in criminal history
9 category III, but because of the armed career criminal
10 status, he -- well, excuse me. Because of 4B1.1(4)(c),
11 he's under criminal history category IV -- excuse me, under
12 criminal history category IV. That, based on the guideline
13 range, his advisory range, under that scenario, would
14 recommend a range of 135 to 168 months.

15 The court is also to consider the factors under
16 18, United States Code, Section 3553(a), which directs the
17 court to impose a sentence sufficient but not greater than
18 necessary to comply with the purposes set forth in
19 paragraph (2) of the subsection.

20 The court, in determining the sentence to be
21 imposed, is to consider the nature and circumstances of the
22 offense and history and characteristics of the defendant.
23 Of course, the nature and circumstances I think have been
24 outlined here. To my understanding, there was a joint
25 operation, I believe, by U. S. Attorney's office and -- or,

1 excuse me, I apologize, by the Madison County agents and --
2 local, state and federal, I guess. It was a joint effort
3 among all three agencies to work various warrants. And in
4 an arrest roundup in this area, Mr. Lemons was found based
5 upon -- I believe as Ms. Smothers indicated, for an
6 outstanding -- I believe it was a probation violation
7 warrant, and that in going to his residence there was found
8 a Hi-Point 9mm carbine rifle, and I believe the officers
9 knew that Mr. Lemons was a convicted felon. And for that
10 reason he was prosecuted in this court for that particular
11 offense.

12 There was no indication that he was using the
13 gun in any other way. He just had it, I guess maybe for
14 protection, not like some situations we find where someone
15 is utilizing it in conjunction with some other offense.
16 But nonetheless, Congress has seen fit to prohibit persons
17 who are felons from possessing or being around firearms.
18 And statistically, I guess that's an appropriate basis
19 simply because so many felons do, regretfully, commit
20 offenses with firearms or other destructive weapons and --
21 Anyway, certainly that's their prerogative, and which they
22 have done.

23 The history and characteristics. Mr. Lemons,
24 as Ms. Smothers pointed out, the vast majority of his prior
25 record emanated from the '90s, and there's been no

1 indication of any subsequent -- Let me make sure I'm not
2 missing something here. No indication of subsequent
3 arrests by authorities. Picking up on what Mr. Powell
4 said, of course, that -- and as Ms. Smothers said, even if
5 he came back here again, he'd be under the same situation.
6 I mean Congress and sentencing creators have -- the
7 sentencing guidelines authors have seen fit to take those
8 matters in consideration and obviously have felt that
9 persons who have been involved in violent criminal offenses
10 and violent felonies in the past are subject to higher
11 sentences than those, obviously, who have not been so
12 involved. So his past has caught up to some degree with
13 Mr. Lemons and will continue so because of his past
14 offenses. But the court has to take that into
15 consideration and will do so in assessing the sentence in
16 this case.

17 The court is also to consider a sentence that
18 would reflect the seriousness of the offense, which I've
19 addressed, promote respect for the law, and provide just
20 punishment for the offense, which the court believes the
21 sentence in this case will do.

22 To afford adequate deterrence to criminal
23 conduct; basically, send a message to others that the type
24 of conduct as committed in this offense should obviously be
25 avoided and is not to be condoned.

1 To protect the public from further crimes of
2 the defendant is a somewhat equivocal factor based upon the
3 fact that Mr. Lemons has not -- at least based on the
4 information I've been provided, has not been involved with
5 the criminal justice system for several years. I think he
6 may have made a lot of sunshine back in the '90s, but at
7 least he's tried to avoid it or has avoided it for several
8 years. And if nothing else, that's certainly indicative
9 that maybe he's trying to move in a different direction.

10 Finally, provide the defendant with needed
11 educational, vocational training, medical care or other
12 correctional treatment, and the court can certainly craft
13 some conditions that I think maybe would help down the line
14 with Mr. Lemons.

15 This is a case -- I mean I'm somewhat
16 conflicted to some degree because of what appears to be a
17 relatively high sentence for this matter. But, by the same
18 token, I'm obligated, certainly, to uphold the Constitution
19 and other laws that Congress has established, created. But
20 hearing all of the arguments and testimony and other
21 matters that have been reviewed, and the presentence
22 report, the court is going to impose the following sentence
23 in this case. I'm going to impose a sentence that I think
24 is sufficient but not greater than necessary to comply with
25 the purposes of 3553(a) and what the court is going to do

1 is impose a sentence of 150 months in this matter. I'm
2 also going to place Mr. Lemons on a period of three years
3 supervised release, along with a \$100 special assessment.
4 I'm not going to impose any fine.

5 I will recommend that he undergo the 500-hour
6 drug program and also that he will undergo drug treatment
7 and testing as deemed necessary by the probation office, as
8 well as cooperate in the collection of DNA. Obviously,
9 he's not able to possess any firearms.

10 I will recommend at some point that he be
11 housed in camp housing, but I think at this point he's not
12 going to qualify for that, Ms. Smothers. So I'll make that
13 recommendation.

14 I don't believe there was any plea agreement in
15 this case, was there?

16 **MS. SMOTHERS:** No, sir.

17 **THE COURT:** No.

18 All right, Mr. Powell, any other objections as
19 far as sentencing, any other matters I failed to address on
20 behalf of the government, sir?

21 **MR. POWELL:** Did I understand that the court
22 sentenced to 150 months?

23 **THE COURT:** That's correct.

24 **MR. POWELL:** Below the 180 mandatory minimum.

25 **THE COURT:** That's correct, under sufficient

1 but not greater than necessary to comply with the purposes
2 of 3553(a).

3 MR. POWELL: Well, pursuant to Bostwick, Your
4 Honor, the court is aware that the government --

5 THE COURT: You can take it up.

6 MR. POWELL: -- must object to --

7 THE COURT: Yes, sir.

8 MR. POWELL: -- the court's imposition of that
9 sentence.

10 THE COURT: I understand. Anything else?
11 Anything else from the defendant?

12 MS. SMOTHERS: No, sir.

13 THE COURT: You'll have ten days to appeal the
14 court's determination. Fourteen days, I'm sorry, to appeal
15 the court's determination. Here's a packet of information
16 for that purpose.

17 All right, anything else?

18 MS. SMOTHERS: No, sir.

19 MR. POWELL: No, sir.

20 THE COURT: All right, you all are excused.

21 (Proceedings concluded at 2:05 p.m.)

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USA V. MICHAEL R. LEMONS
NO. 1:08-CR-10102-JDB-1

REPORTER'S CERTIFICATION

I certify that the foregoing is a correct transcript
from the record of proceedings in the captioned matter in
the United States District Court, Western District of
Tennessee, Eastern Division.

s/Christine Martin, OCR

July 8, 2010